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 12
 13 UNITED STATES DISTRICT COURT
 14
 15 NORTHERN DISTRICT OF CALIFORNIA

16 DOLORES A. ARREGUIN, for herself
 17 and other members of the general public
 18 similarly situated,

19 Plaintiff,

20 v.

21 GLOBAL EQUITY LENDING, INC., a
 22 Georgia Corporation and DOES 1 through
 23 10, inclusive,

24 Defendant.

25 CASE NO. C-07-6026-MHP

26
 27
 28 **MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 DEFENDANT GLOBAL EQUITY
 LENDING, INC.'S MOTION FOR LEAVE
 TO FILE A MOTION TO DISMISS**

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 30 **[CIVIL LOCAL RULE 7-11; JUDGE
 PATEL'S STANDING ORDER NO. 4]**

31 Courtroom: 15, 18th Floor
 32 Judge: Hon. Marilyn Hall Patel

33 Complaint filed: November 29, 2007

34 I.

35 **INTRODUCTION**

36 In response to Plaintiff's Complaint, defendant GLOBAL EQUITY LENDING, INC.
 37 (hereinafter referred to as "GLOBAL") filed a Motion to Dismiss for improper venue based on a
 38 forum-selection clause, and alternatively, a Motion to Compel Arbitration. Unfortunately,
 39 defendant GLOBAL filed the Motion to Dismiss without first obtaining the leave of court
 40 pursuant to this Court's Standing Order No. 4.

41 Because the parties have contractually agreed to forum other than this Court, GLOBAL's
 42 motion to dismiss must be decided first. Only if this Court denies that motion and does not
 43 enforce the forum-selection clause would it be appropriate for it to rule on GLOBAL's motion to

1 compel arbitration. Therefore, pursuant to Local Rule 7-11, GLOBAL submits this Motion for
2 Leave to file its Motion to Dismiss and have the motion heard concurrently with its Motion to
3 Compel Arbitration, or alternatively, to have both the Motion to Dismiss and Motion to Compel
4 heard concurrently on a date following the initial Case Management Conference now set for
5 March 10, 2008.

6 **II.**

7 **PROCEDURAL BACKGROUND**

8 **A. Plaintiff's Complaint**

9 Plaintiff's Complaint alleges that she was employed by GLOBAL from approximately
10 July 2002 to June 10, 2007. [Complaint, ¶7.] Based on her alleged employment relationship with
11 GLOBAL, she seeks damages and injunctive relief claiming that GLOBAL had a duty and was
12 obligated to reimburse plaintiff for the actual expenses incurred and her use of a personal
13 automobile in the course and scope of her employment.

14 **B. Defendant GLOBAL'S Motion To Dismiss**

15 Although not alleged in Plaintiff's Complaint, her relationship with GLOBAL was
16 governed during the relevant time frame by an Agreement which included a forum-selection
17 clause and an arbitration clause. A copy of the Agreement is attached as Exhibit "A" to the
18 Declaration of Sandra Croteau, submitted in support of both the Motion to Dismiss and Motion to
19 Compel Arbitration. The forum-selection clause in the Agreement provides that venue **shall** be in
20 Cobb County or Gwinnett County Superior Court, Georgia.

21 Since this action was filed in an improper venue pursuant to the terms of the Agreement,
22 GLOBAL filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure Rule 12(b)(3),
23 which is the appropriate means to seek judicial enforcement of a forum-selection clause in the
24 Ninth Circuit. [*Argueta v. Banco Mexicano S.A.* (9th Cir. 1996) 87 Fed. 3d 320, 324.]

25 This motion was initially set for hearing on March 3, 2008, concurrently with GLOBAL'S
26 Motion to Compel Arbitration. However, the Court notified GLOBAL's counsel shortly after the
27 filing of the Motion to Dismiss that leave of court was required to have the Motion to Dismiss
28 heard pursuant to this Court's Standing Order No. 4.

1 **C. Defendant's Motion To Compel Arbitration**

2 The Agreement also contained a provision pursuant to which the parties agreed to submit
 3 to arbitration all claims "arising out of or relating to" the Agreement. Therefore, in order to avoid
 4 any potential argument of waiver, GLOBAL also brought a Motion to Compel Arbitration in the
 5 alternative to its Motion to Dismiss for improper venue.

6 **III.**

7 **LEGAL ARGUMENT**

8 **LEAVE SHOULD BE GRANTED FOR DEFENDANT TO HAVE ITS MOTION TO
 9 DISMISS FILED AND HEARD CONCURRENTLY WITH ITS MOTION TO COMPEL
 10 ARBITRATION**

11 As discussed above, GLOBAL's Motion to Dismiss is based on the existence of a forum-
 12 selection clause in the Agreement between Plaintiff and GLOBAL. Under federal law, forum-
 13 selection clauses are presumed to be valid and, as a general rule, will be enforced by courts. [M/S
 14 *Bremen v. Zapata Off-Shore Co.* (1972) 407 U.S. 1, 15; *Manetti-Farrow, Inc. v. Gucci America*,
 15 *Inc. supra*, 858 F. 2nd at 512.]

16 Since the parties to the Agreement have contractually designated either Cobb County or
 17 Gwinnett County Superior Court in Georgia as the proper forum for any litigation concerning the
 18 Agreement, GLOBAL's Motion to Dismiss should be decided in advance of any ruling on
 19 GLOBAL's Motion to Compel Arbitration. If the Court determines that the forum-selection
 20 clause should be enforced, it would then be inappropriate for this Court to determine whether the
 21 arbitration provision of the Agreement should be enforced. In that event, GLOBAL's Motion to
 22 Compel Arbitration would be rendered moot, since the entire action must be dismissed and re-
 23 filed in the proper venue before any further matters concerning the enforcement of the Agreement
 24 could be decided.

25 On the other hand, if this Court determines that the forum-selection clause should not be
 26 enforced, only then would it be appropriate for this Court to determine whether the arbitration
 27 provision should be enforced. Therefore, in order to conserve judicial and party resources, and
 28 recognizing that the issue of the validity and enforceability of the forum-selection clause is a

1 preliminary issue which must be decided before this Court can appropriately address GLOBAL's
 2 Motion to Compel Arbitration, GLOBAL's Motion to Dismiss should be heard concurrently and
 3 decided in advance of GLOBAL's Motion to Compel Arbitration.

4 Consequently, GLOBAL respectfully requests that this Court grant leave for the filing of
 5 GLOBAL's Motion to Dismiss, and further order that the motion be heard on March 3, 2008,
 6 concurrently with GLOBAL's Motion to Compel Arbitration. However, if this Court prefers that
 7 GLOBAL's Motion to Dismiss not be heard in advance of the initial Case Management
 8 Conference, consistent with its Standing Order No. 4, GLOBAL respectfully requests that this
 9 Court nevertheless grant leave for the filing of the Motion to Dismiss and further order that both
 10 the Motion to Dismiss and Motion to Compel Arbitration be heard at a date subsequent to the
 11 initial Case Management Conference.

12 **IV.**

13 **CONCLUSION**

14 Based on the foregoing, defendant GLOBAL respectfully requests that this Court grant
 15 leave for the filing of GLOBAL's Motion to Dismiss, and further order that the Motion to
 16 Dismiss and Motion to Compel Arbitration be heard concurrently on March 3, 2008, or
 17 alternatively, a later date at the convenience of the court.

18 Dated: January 25, 2008

19 ROPERS, MAJESKI, KOHN & BENTLEY

20 By: 

21 J. MARK THACKER
 22 Attorneys for Defendant
 23 GLOBAL EQUITY LENDING, INC.
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